# UNITED STATES GOVERNMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 31

AEP INDUSTRIES, INC.

Employer

and Case No. 31-RC-8787

UNITED INDUSTRIAL & SERVICE WORKERS OF AMERICA (UISWA)

Petitioner

and

WAREHOUSE, PROCESSING & DISTRIBUTION WORKERS UNION, ILWU, LOCAL 26

Intervenor

## **DECISION AND DIRECTION OF ELECTION**

On December 9, 2009, the United Industrial & Service Workers of America (Petitioner UISWA) filed petition 31-RC-8787 under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of warehouse employees employed by AEP Industries, Inc. (AEP or Employer) at its facilities located at 14000 Monte Vista Avenue, Chino, California 91710 and at 6911 Bickmore Avenue, Suite 200, Chino, California 91708. Another Union, Warehouse, Processing & Distribution Union, ILWU, Local 26, (the Intervenor) has been the recognized

collective bargaining representative of the Employer's employees in the petitioned-for unit.

On December 23, 2009, a hearing was held on the petition. The only issue presented at the hearing was whether Petitioner UISWA is a labor organization under Section 2(5) of the Act. The Employer and the Petitioner both take the position that Petitioner UISWA is a labor organization under Section 2(5) the Act. The Intervenor, however, takes the position that Petitioner UISWA is not a labor organization under Section 2(5) of the Act.

For the reasons set forth in Section **III** below, I conclude that Petitioner UISWA is a labor organization under Section 2(5) of the Act.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

I. <u>HEARING OFFICER RULINGS</u>: The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.<sup>1</sup>

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Ruling Regarding Subpoena: The hearing officer denied the Petitioner's motion to quash a subpoena duces tecum served by Intervenor on the Petitioner. (Intervenor Exhibit 1.) The subpoena sought UISWA's constitution and bylaws, UISWA's last three LM-2 Forms, copies of all UISWA's collective bargaining agreements with any employer, and all documents showing that UISWA has been certified as the collective bargaining representative of employees of any employer. Nevertheless, the hearing officer appropriately refused to seek enforcement of the subpoena served on the Petitioner based on her finding that the documents subpoenaed were not necessary in the determination of whether the Petitioner is a labor organization within the meaning of the Act.

<sup>&</sup>lt;u>Refusal to Compel Testimony</u>: Although Cesar Guerrero, a business representative of Petitioner UISWA, testified on the stand at the hearing in the morning, Mr. Guerrero refused to return to the stand for further examination by the Intervenor in the afternoon. The Intervenor requested that the hearing officer compel Mr. Guerrero's testimony. The hearing officer stated that although she could not

- II. **JURISDICTION:** The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.<sup>2</sup>
- III. <u>LABOR ORGANIZATIONS</u>: The parties stipulated and I find that the Intervenor is a labor organization that is the exclusive bargaining representative of certain employees of the Employer and is party to a collective bargaining agreement with the Employer that is in effect from March 1, 2007, through February 28, 2010 (the Contract). As noted above, the Intervenor challenges the Petitioner UISWA's status as a labor organization.

compel Mr. Guerrero to return to the witness stand, she would entertain motions to strike his testimony. No party made such a motion. The Intervenor also requested that Petitioner UISWA Vice President John Romero, Jr., be called to the witness stand. Although Mr. Romero had been in the hearing room all morning, he left the room when the Intervenor's counsel stated that he wished to call Mr. Romero to the stand. The hearing officer informed the parties that, as with Mr. Guerrero, Mr. Romero was not under subpoena or court order compelling him to testify.

<u>Post-Hearing Brief</u>: The Intervenor attached exhibits to its post-hearing brief that were not part of the evidentiary record. I will disregard these exhibits. I also will disregard references in the brief to information contained in exhibits that were rejected by the hearing officer. The hearing officer properly rejected these exhibits, which relate to an indictment and guilty pleas of individuals who have served as officers of the Petitioner for conduct in 2003 relating to another labor organization. See *Coinmach Laundry*, 337 NLRB 1286 (2002).

<sup>2</sup> The Employer, AEP Industries, Inc., a Delaware corporation, is engaged in the business of manufacturing plastic sheeting with its primary office and place of business located at 125 Phillips Avenue, South Hackensack, New Jersey 07606. Within the past twelve months ending December 22, 2009, the Employer purchased and received at its 14000 Monte Vista Avenue, Chino, California and 6911 Bickmore Avenue, Suite 200, Chino, California facilities goods valued in excess of \$50,000 directly from points located outside the State of California.

<sup>3</sup> According to the Contract, the employees at the Chino, California, factory and warehouse represented by the Intervenor are "all production, maintenance, warehouse and miscellaneous employees, except those office employees and [those] working as supervisors."

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Section 2(5) of the Act provides the following definition of a "labor organization":

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As the Board noted in *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 852 (1962), only two criteria are necessary for a union to meet the statutory definition of a labor organization: (1) it must be an organization in which employees participate; and (2) it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms of employment. *Id.* 

If an organization fulfills these two requirements, the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

*Id.* at 851-52. See also *Coinmach Laundry Corp.*, 337 NLRB 1286 (2002) (The Board, upholding its decision in *Alto Plastics*, denied review of regional director's ruling that documents allegedly necessary to show that the petitioner's officers had criminal records were irrelevant.).

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That "employees participate" may be demonstrated through such evidence as the signing of authorization cards, attendance at meetings, the formation of employee committees and the right to elect officers and to vote on the adopting of by-laws and other matters of importance. See *Michigan Bell Telephone Co.*, 182 NLRB 632 (1970); *Alto Plastics*, 136 NLRB at 852. Evidence that a labor organization negotiates collective bargaining agreements with employers and processes employee grievances is more than sufficient to prove that it "has the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of employment." *Alto Plastics*, 136 NLRB at 852. If one of the purposes itemized in the statute is among the reasons for a labor organization's existence, it is not necessary to establish that such purpose has actually been accomplished. See *Betances Health Unit*, 283 NLRB 369, 375 (1987) (Where an organization exists for the purpose of representing employees concerning grievances, labor disputes, or conditions of work, the fact that such purposes have not come to fruition does not bar a conclusion that it is a labor organization.).

Here, the evidence establishes that the Petitioner UISWA is an organization in which employees participate by attending membership meetings, by voting in officer elections, by serving as bargaining committee members, and by serving as shop stewards. Board Exhibit 1 establishes that Petitioner UISWA was recently certified as the collective bargaining representative for a unit of employees in Rancho Cucamonga, California. Further, the Petitioner UISWA negotiates collective bargaining agreements with several employers, and the agreements deal with terms and conditions of work. In addition, Petitioner UISWA is involved in processing grievances for the employees it represents. Thus, the evidence establishes that Petitioner UISWA is an organization in which employees participate and that it exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms of employment.

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Through testimony, it was elicited that Petitioner UISWA has both bylaws and a constitution. In the absence of documentary evidence in the record to support this assertion, the Intervenor questions the existence of these documents. Nevertheless, the Board has held that "structural formalities are not prerequisites to labor organization status." *Yale New Haven Hospital*, 309 NLRB 363 (1992) (no constitution, bylaws, meetings or filings with the Department of Labor); *Betances Health Unit*, 283 NLRB 369, 375 (1987) (no formal structure and no documents filed with the Department of Labor); *Butler Mfg. Co.*, 167 NLRB 308 (1967) (no constitution, bylaws, dues, or initiation fees); *East Dayton Tool & Die Co.*, 194 NLRB 266 (1971) (no constitution or officers).

Harrah's Marina Hotel and Casino, 267 NLRB 1007 (1983), cited by the Intervenor, is distinguishable. There, the Board affirmed the regional director's decision that the petitioner was not an organization dedicated to the interests of employees as a bona fide collective bargaining representative; that the petitioner was not an organization in which employees participate to any significant extent in the governance and administrative thereof; and, therefore, that the petitioner was not a labor organization. In that case, the regional director found that there was no evidence that the union had ever had a general membership meeting, had ever had an election of officers, or had ever countenanced employee participation in its affairs. The regional director specifically distinguished the case from Alto Plastics Manufacturing Corp. on that basis.

As discussed above, the evidence here shows that the Petitioner UISWA holds membership meetings, elects its officers by secret ballot election, negotiates collective-bargaining agreements with employers, and processes grievances. Further, the Intervenor has provided no valid basis for distinguishing this case from *Alto Plastics* and its progeny, in which the Board has consistently held that allegations of officer corruption and malfeasance are insufficient to rebut a union's status as a labor

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organization. See, e.g., Coinmach Laundry Corp., 337 NLRB 1286 (2002); Mohawk Flush Doors, Inc., 281 NLRB 410 (1986).

In its brief, the Intervenor relies on the Board's decision in *McDonald's of Canoga Park California, Inc.*, 162 NLRB 367 (1966). There, the Board found that the petitioner was not a bona fide labor organization given that the evidence supported the contention that the petitioner was a labor consultant in service of employers, and was not competent to act as an employee bargaining representative. *Id.* at 368. No similar evidence was presented in the instant case.

Here, the record supports a finding that the Petitioner UISWA is a labor organization under Section 2(5) of the Act given that it is an organization in which employees participate and that it exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employments.

- **IV. QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.
- V. <u>APPROPRIATE UNIT</u>: The parties stipulated and I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

#### **INCLUDED:**

All full-time and regular part-time production, maintenance, warehouse, truck drivers, and miscellaneous employees employed at the Employer's facilities located at 14000 Monte Vista Avenue, Chino, California 91710 and 6911 Bickmore Avenue, Suite 200, Chino, California 91708.

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**EXCLUDED:** All office employees, guards, and supervisors as

defined in the National Labor Relations Act, as

amended.

VI. <u>CONCLUSION</u>: On the basis of the foregoing and the record as a whole, I find that the Petitioner UISWA is a labor organization under Section 2(5) of the Act. Accordingly, I shall direct an election in the appropriate unit described above. There are approximately 118 employees in the Unit found appropriate.

#### DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the Unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Petitioner, United Industrial & Service Workers of America (Petitioner UISWA), or by the Intervenor, Warehouse, Processing & Distribution Workers Union, ILWU, Local 26. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

# **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

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replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 31 Regional Office, 11150 W. Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824, on or before **January 11, 2010.** No extension of time to file this list will be granted

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except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, <a href="www.nlrb.gov">www.nlrb.gov</a>, by mail, by hand or courier delivery, or by facsimile transmission at (310) 235-7420. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

# **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club* 

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<sup>&</sup>lt;sup>4</sup> To file the eligibility list electronically, go to <a href="www.nlrb.gov">www.nlrb.gov</a> and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Regional, Subregional and Resident Offices and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, <a href="www.nlrb.gov">www.nlrb.gov</a>.

Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **January 19, 2010.** The request may be filed electronically through the Agency's web site, <a href="www.nlrb.gov">www.nlrb.gov</a>, <sup>5</sup> but may not be filed by facsimile.

**DATED** at Los Angeles, California this 4<sup>th</sup> day of January, 2010.

/s/ James J. McDermott

James J. McDermott, Regional Director National Labor Relations Board Region 31

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<sup>&</sup>lt;sup>5</sup> To file the request for review electronically, go to <a href="www.nlrb.gov">www.nlrb.gov</a> and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.